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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
v.)	Civil No. CV 98-3-H-CCL
ASARCO INCORPORATED,)	
)	
Defendant.)	
)	

ASARCO'S STATEMENT OF GENUINE ISSUES

ASARCO LLC ("ASARCO") respectfully submits this Statement of
Genuine Issues pursuant to Local Rule 56.1(b), in response to United States'
Statement of Undisputed Facts ("SUF") in support of United States' Motion for

Summary Judgment Pursuant to Fed. R. Civ. P. 56, or in the Alternative, to Dismiss for Failure to Join a Necessary Party Pursuant to Fed. [R.] Civ. P. 19(a), or in the Alternative, to Stay These Proceedings, dated May 17, 2010 (Docket No. 20).

SUF No. 1

On October 16, 2007, Asarco executed a Trust Agreement it had drafted as the grantor ("Grantor"). CAMU TRUST at 1, § 1(a).

Response to SUF No. 1

ASARCO does not dispute this fact.

SUF No. 2

Mr. Dan Silver is the trustee ("Trustee"). *Id.* at 1.

Response to SUF No. 2

ASARCO does not dispute this fact.

SUF No. 3

The United States Environmental Protection Agency ("EPA") is the sole beneficiary ("Beneficiary"). *Id.*, § 3.

Response to SUF No. 3

ASARCO does not dispute this fact.

SUF No. 4

The Trust is irrevocable, *id.*, and is to be administered according to the laws of the State of Montana. *Id.* at 4, § 17.

Response to SUF No. 4

ASARCO does not dispute the fact the CAMU Trust is to be administered according to the laws of the State of Montana. ASARCO does not dispute the fact that the CAMU Trust is irrevocable to the extent that irrevocability is subject to the right of the parties to amend the CAMU Trust Agreement.¹ However, ASARCO disputes the implication that “irrevocable,” as used by the United States in SUF No. 4, means that the CAMU Trust cannot be terminated by agreement of the parties or under Montana trust law. *Id.* ASARCO also disputes any implication that because the CAMU Trust is “irrevocable,” the money in the Trust is no longer ASARCO’s property.² ASARCO retained some of its property rights to the funds it transferred into the CAMU Trust. Under the terms of the CAMU Trust Agreement, ASARCO is entitled to reimbursement from the Trust of its CAMU cleanup expenditures and to a refund of any residual Trust funds.³

¹ Declaration of Gregory Evans in Support of Motion of ASARCO Incorporated to Terminate the East Helena CAMU Trust and to Distribute Remaining Trust Property (Docket No. 10-1) (hereinafter, the “Evans Decl.”) ¶ 3, Ex. B at 3 § 15 (East Helena CAMU Trust Agreement (the “CAMU Trust Agreement”) at 3 § 15) (Docket No. 10-3).

² United States’ Memorandum of Law in Opposition to ASARCO’s Motion to Terminate the East Helena CAMU Trust and Distribute Remaining Trust Property and in Support of the United States’ Cross Motion for Summary Judgment or, in the Alternative, to Dismiss for Failure to Join a Necessary Party or, in the Alternative, to Stay (the “Cross Motion Memorandum”) (Docket No. 18) at 3, 19, 20-21, 23 (stating that the United States considers CAMU Trust funding to be a “past payment” that is “no longer ASARCO’s property”).

³ Evans Decl. ¶ 3, Ex. B at 2 (CAMU Trust Agreement at 2 § 4).

SUF No. 5

Section 14 of the Trust provides the sole method for amendment.

Id. at 3.

Response to SUF No. 5

ASARCO does not dispute the fact that Section 14 provides a method for amendment of the CAMU Trust Agreement. However, ASARCO disputes this fact to the extent that it incorrectly states that Section 14 provides the “sole” method for amendment. *Id.* at 3, § 14. ASARCO also disputes any implication that ASARCO ever amended or attempted to amend any aspect of the CAMU Trust Agreement.

SUF No. 6

The plain purpose of the CAMU Trust is to provide for the payment of the costs of building, filling, and closing the second phase of the CAMU in use at the East Helena smelter. CAMU Trust at 1-2, §§ 2, 4 and the Second Whereas Clause.

Response to SUF No. 6

ASARCO disputes this fact.

The plain purpose of the CAMU Trust was to provide financial assurance that funds would be available when needed for corrective work that ASARCO was obligated to perform under a Consent Decree entered into between the United States Environmental Protection Agency (the “EPA”) and ASARCO on May 6,

1998 (the “1998 Consent Decree”), which resolved ASARCO’s liabilities under the Resource Conservation and Recovery Act (“RCRA”). *Id.* at 1, first and second “Whereas” clauses; *see also* Letter from Sharon Kercher of the EPA to Jon Nickel of ASARCO, dated August 9, 2007 (the “EPA Letter”) (Docket No. 10-10).⁴ In addition to delineating ASARCO’s corrective action obligations, the 1998 Consent Decree required ASARCO to secure and maintain financial assurance to guarantee its performance of the cleanup work at the East Helena facility.⁵

The EPA’s official guidance on financial assurance states that financial assurance is required under RCRA to “demonstrate financial responsibility for corrective action” and to “ensure [that] adequate funds are available to undertake the necessary corrective action at the [RCRA] facility in the event . . . the facility owners and operators are unable to do so.”⁶ In accordance with this official EPA policy, the purpose of the CAMU Trust was to provide a financial backstop or

⁴ Evans Decl. ¶ 10, Ex. I (noting that the purpose of the CAMU Trust was to ensure that funding was sufficient “so that if ASARCO fails to complete the CAMU, EPA can take over and complete the work.”).

⁵ Evans Decl. ¶ 3, Ex. B at 1 (CAMU Trust Agreement at 1, first “Whereas” clause); *see also*, RCRA Consent Decree, Jan. 23, 1998 (Docket No. 1) at ¶ 95.

⁶ Evans Decl. ¶ 8, Ex. G at 4 (U.S. EPA, Memorandum, Transmittal of Interim Guidance on Financial Responsibility for Facilities Subject to RCRA Corrective Action, Sept. 30, 2003 at 4) (Docket No. 10-8).

guarantee in case ASARCO failed to perform the required work on the CAMU, not to directly pay for costs of constructing the CAMU.⁷

SUF No. 7

The work covered by the CAMU Trust is not complete. U.S. Exhibit 1: Declaration of Linda Jacobson.

Response to SUF No. 7

ASARCO does not dispute this fact to the extent that some of the work on the CAMU has not yet been completed. However, ASARCO disputes the fact that the corrective work at issue was “covered” by the CAMU Trust if the word “covered” connotes “paid for.” The purpose of the CAMU Trust was to provide financial security for ASARCO’s performance of the cleanup work, not a direct payment for the work.⁸

ASARCO also disputes the implication that because more work remains to be done on the CAMU, the purpose of the CAMU Trust has not been fulfilled, and the CAMU Trust cannot be terminated. Upon its emergence from bankruptcy, ASARCO provided funding to complete all outstanding work on the CAMU pursuant to the Consent Decree and Settlement Agreement Regarding the Montana Sites, filed in the United States Bankruptcy Court for the Southern District of

⁷ Evans Decl. ¶ 3, Ex. B at 1 (CAMU Trust Agreement at 1, first and second “Whereas” clauses); Evans Decl. ¶ 10, Ex. I (EPA Letter).

⁸ Evans Decl. ¶ 3, Ex. B at 1 (CAMU Trust Agreement at 1, first and second “Whereas” clauses).

Texas on March 13, 2009 (Docket No. 10539) (the “Montana Sites Settlement”).⁹

In exchange for a payment of \$100 million and the transfer of the realty resources comprising the East Helena facility into a custodial trust, the Montana Sites Settlement expressly resolved all of ASARCO’s outstanding obligations under the 1998 Consent Decree and other EPA orders regarding the East Helena facility, necessarily including ASARCO’s obligation to complete the CAMU, as well as the requirement to maintain financial assurance as a guarantee that ASARCO would perform its CAMU work obligations.¹⁰

United States acknowledges that work on the CAMU is a “specific subset of the cleanup work required by the 1998 Consent Decree.”¹¹ United States has previously represented to the Court that ASARCO is no longer liable for any tasks remaining under the 1998 Consent Decree, and that the trustee of the custodial trust established pursuant to the Montana Sites Settlement will assume ASARCO’s continuing obligations under the 1998 Consent Decree solely to the full extent of

⁹ Evans Decl., ¶ 2, Ex. A at 6-7 (Montana Sites Settlement) (Docket No. 10-2).

¹⁰ *Id.* § 19 at 45, § 22 at 48; § 23 at 49. The Montana Sites Settlement provided in § 22 that all outstanding obligations of ASARCO “under any Consent Decree, Unilateral Administrative Order, Agreed Order, or Administrative Order on Consent for the Montana Designated Properties or Montana Sites (including but not limited to obligations to perform)” are “fully resolved and satisfied by this Settlement Agreement.” In § 23, the Montana Sites Settlement provided that the Montana Custodial Trust “shall assume [ASARCO’s] obligations . . . for the East Helena Designated Property . . . [and] [ASARCO’s] obligations under the Montana Consent Decrees.”

¹¹ Cross Motion Memorandum at 10.

the \$100 million and the East Helena realty resources transferred by ASARCO into the custodial trust.¹²

Consequently, even though work on the CAMU may not have been completed yet, ASARCO has fully satisfied its obligation to perform any remaining CAMU work through the Montana Sites Settlement, and there is no longer an outstanding obligation for the CAMU Trust to guarantee.¹³ The purpose of the CAMU Trust has been entirely fulfilled, and there is no reason for the CAMU Trust to continue.

SUF No. 8

Approximately \$1.2 million remains in the Fund. Asarco Exhibit D at 1.

Response to SUF No. 8

ASARCO does not dispute the fact that as of December 2009, approximately \$1.2 million remained in the CAMU Trust. However, ASARCO disputes this fact to the extent that the United States uses the term "Fund" in SUF No. 8 to imply that funds transferred by ASARCO into the CAMU Trust were intended as a

¹² United States' Unopposed Motion to Reopen Case for Purposes of Substituting Parties and Modifying the Consent Decree, filed on December 18, 2009 (Docket No. 5) at 4, 5, 7.

¹³ Evans Decl., ¶ 2, Ex. A at 6-7 (Montana Sites Settlement § 19 at 45, § 22 at 48; § 23 at 49).

source of direct payment for work required under the 1998 Consent Decree, rather than as financial assurance for such work.¹⁴

Respectfully submitted this 7th day of June, 2010.

By: /s/ Kenneth Lay

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FOR ASARCO INCORPORATED

¹⁴ Evans Decl. ¶ 3, Ex. B at 1 (CAMU Trust Agreement at 1); Evans Decl. ¶ 10, Ex. I (EPA Letter).